

APPENDIX B

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

1. Instructions for use of this schedule

a. This schedule is a guide. Discipline is not punitive in nature, is expected to be progressive for subsequent offenses, and normally falls within the range shown in this Appendix or those established in an Alternative Discipline System. Mitigating or aggravating factors can justify a remedy outside the range. For example, remedies greater than those shown can be appropriate when the facts of an aggravated offense, frequent infractions, or simultaneous multiple offenses are established.

b. Consistent with DON policy in SECNAVINST 12752.XX, the schedule generally provides for a range of remedies (e.g., Reprimand to Removal) to provide management with flexibility in correcting conduct deficiencies. Selection of a reasonable remedy from such a broad range should be made with good judgment, including consideration of any appropriate "Douglas Factors," Appendix C. Excessive, arbitrary or capricious remedies and remedies selected without consideration of mitigating factors may be reversed by third parties, if challenged.

c. Some of the offenses listed in this schedule combine several offenses in one statement connected by the word "or." Use only the portion of the statement of offense that accurately describes the employee's conduct; leave out all parts that do not apply. In choosing a charge, it may be better to describe the offense, rather than select a charge from the schedule that does not accurately describe the offense, and then to refer to similar offenses in the schedule when selecting the remedy.

d. The schedule does not cover every possible offense. When specifying an offense not listed in the schedule, be careful when using terms such as "theft" or "fraud," which require establishing the element of intent and should only be used when the element of intent can be proven. Management officials should contact their servicing HRO for assistance in framing appropriate charges.

e. Due to the nature of their positions, offenses by supervisors or managers may warrant more severe remedies than the same offense committed by a non-supervisory employee.

f. All disciplinary actions are to be taken following the provisions of law.

g. All adverse action cases, whether based on off-duty or on-duty misconduct, require establishment of a nexus or link between the conduct and its effect upon the efficiency of the service. Nexus is normally assumed when the misconduct is sustained in on-duty misconduct cases. In taking adverse actions for off-duty misconduct, the deciding official must show, by preponderant evidence, that the adverse action will promote the efficiency of the service by establishing a nexus between the off-duty misconduct and the employee's or activity's performance. The activity should not rely on a presumption of nexus but should make its strongest possible argument and introduce evidence showing the relationship between the misconduct and the employee's or activity's performance. The Merit Systems Protection Board generally recognizes three independent means by which an agency may show a nexus linking an employee's off-duty misconduct with the efficiency of the service: (1) a rebuttable presumption of nexus that may arise in certain egregious circumstances based on the nature and gravity of the misconduct; (2) a showing by preponderant evidence that the misconduct affects the employee's or his co-workers' job performance, or management's trust and confidence in the employee's job performance; and (3) a showing by preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. Actual impairment need not be shown, but the agency can establish that the off-duty misconduct is "directly opposed to the agency's mission." Some of the means for showing nexus include but are not limited to establishing: the probability that off-duty misconduct could happen at work; the misconduct caused such notoriety it has affectivity activity's ability to accomplish its mission; the misconduct impacted the work of the supervisor or other employees in the work area.

h. Servicing HROs can provide advice and assistance with issues such as establishing the required nexus between off-duty misconduct and the efficiency of the service, appropriate wording of the charge(s), application of mitigating factors, consistency of remedies, etc., based on current case law. Activity heads/commanders, managers, and supervisors delegated authority to propose and/or decide disciplinary actions are encouraged to take advantage of such assistance to ensure conformance with this Directive.

2. Past offenses

a. When used to select a range of remedies or remedy, a past offense must be described in sufficient detail to enable the employee to understand and respond to it. Past offenses may be used in determining a range of remedies or remedy when:

(1) The employee was disciplined in writing;

(2) The employee was provided the opportunity to dispute the action to a higher level; and

(3) The action was made a matter of record in the employee's OPF.

b. Any past offense may form the basis for proposing a remedy from the next higher range of remedies for a subsequent offense. The offenses need not be identical or similar.

c. In its decision in United States Postal Service v. Gregory (122 S. Ct. 431 (2001)), the Supreme Court held that the Board may independently review prior disciplinary actions which are pending in grievance proceedings in order to determine the reasonableness of the penalty under appeal. You are cautioned to carefully examine any prior disciplinary actions that are being challenged if they are a factor in determining the reasonableness of the penalty.

d. The following actions may not be counted as past offenses for determining a range of remedies (however, actions discussed in paragraphs (1) and (2) above may be considered when determining an appropriate remedy within a range for any subsequent offense):

(1) Oral admonishments and letters of caution or requirement.

(2) Letters of reprimand dated more than two years before the date of any advance written notice required under this Directive.

(3) Reductions in grade or pay not effected for disciplinary reasons.

3. Other statutory and regulatory offenses. For information concerning other offenses for which employees may be disciplined by removal, fine or imprisonment, including offenses which require minimum mandatory remedies (such as misuse of government vehicles, Hatch Act violations, and giving gifts to superiors), see 5 CFR 734, 5 CFR 735, 5 CFR 2635, and DoD 5500.7-R.

4. Drug and alcohol abuse offenses. Any employee who engages in misconduct involving drugs and/or alcohol shall be disciplined according to this Appendix, except when covered under safe harbor. Safe harbor is a special situation described as: When the activity is unaware of illegal drug usage, an employee who voluntarily refers himself or herself to the CEAP as a user of

illegal drugs under the Safe Harbor provisions of Implementation Directive 792-XX (Civilian Drug-Free Workplace Program in the Department of the Navy) will be exempt from disciplinary action for the admitted acts, including possession incident to such use, provided the employee meets and complies with the requirements of Implementation Directive 792-XX, paragraph 7.b. Employees who admit to using drugs after being notified of a scheduled drug test or just after it is collected, or found to use drugs on the basis of appropriate evidence, drug trafficking and other drug-related misconduct are not covered under safe harbor, per Implementation Directive 792-XX, paragraph 7.b. Also, safe harbor does not insulate the employee from removal based on loss of security clearance. The range of remedies is broad for the various drug abuse first offenses. To determine the appropriate corrective action, you will consider the Douglas Factors in Appendix C. In doing so, you must also recognize that some positions are so sensitive that the conduct affects the employee's or his co-workers' job performance or negatively impacts management's trust and confidence in the employee's job performance. Thus, while counseling is always offered, a higher penalty than the minimum is appropriate in such cases.

5. Reasonable Accommodation. Guidance on providing reasonable accommodation is found at the EEOC web site (<http://www.eeoc.gov>) entitled Enforcement Guidance: on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act. You should also check with Office of Counsel to ensure you apply this guidance in a manner consistent with DON Policy.

a. Under the Rehabilitation Act Amendments of 1992, the standards applied under Title I of the Americans with Disabilities Act (ADA) are applicable to Federal employees. Section 104(c)(4) of the ADA permits a covered employer to hold employees who have drug and alcohol problems to the same qualification standards for employment or job performance and behavior as other employees, even if any unsatisfactory performance or behavior is related to the employee's alcoholism. (29 U.S.C. s 12114(c)(4))

(1) An agency is no longer required to offer an alcoholic employee who engages in misconduct a firm choice between treatment and discharge. While the ADA requires employers to consider other forms of reasonable accommodation for employees with alcoholism, for example, a flexible schedule or leave to accommodate an employee's treatment, employers do not have to excuse the violation of uniformly applied conduct or job performance standards by offering firm choice as a form of reasonable accommodation. (Dennis D. Johnson v. Babbitt, Secretary, Department of the Interior, EEOC Petition No. 03940100 (28 March 1996))

(2) To be considered a request for reasonable accommodation, the employee must request accommodation before s/he has committed the misconduct that violates one of the agency's qualification standards for employment or job performance and behavior under which the agency uniformly imposes discipline. (Francis P. Walsh v. USPS, 74 M.S.P.R. 627(1997))

(3) An individual who is currently engaging in the illegal use of drugs, when the agency acts on the basis of such use, is excluded from the definition of "individual with disabilities" in accordance with 29 CFR 1614.203(h).

(4) Trafficking in drugs is misconduct that does not normally entitle an employee to reasonable accommodation. Accordingly an employee who traffics in drugs will be subject to remedies as provided for in this Appendix.

b. Undue hardship on an activity/command. 29 CFR 1614.203 provides that reasonable accommodation is not required when it would impose an undue hardship on the operation of the program of the employee's activity/command. Undue hardship must be based on an individualized assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense.

c. Conduct that takes an employee outside the protection of the Rehabilitation Act. Similar to paragraph b above, the MSPB has held that there are "...certain acts of misconduct which when committed by an employee who is an alcoholic or drug addict, take that employee outside the scope of the protecting legislation because the misconduct renders that person not a 'qualified' individual with disabilities." Egregious or notorious misconduct that hampers an employee's ability to perform his or her duties or to represent the agency, or which strikes at the core of the job or the agency's mission, can, standing alone, disqualify a Federal employee from his or her position (see Hougens v. U.S.P.S., 38 M.S.P.R. 135 (1988)).

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>ALCOHOL ABUSE</u>			
Unauthorized possession, sale or transfer of alcohol on duty or on a military ship, aircraft, submarine, activity, or command	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
*Use of, or being under the influence of alcohol on duty or on a military ship, aircraft, submarine, activity or command	14-day suspension to removal	30-day suspension to removal	Removal
<u>ATTENDANCE</u>			
Excessive unauthorized absence (more than 5 consecutive workdays)	Reprimand to removal	10-day suspension to removal	Removal
Leaving job to which assigned or leaving Navy premises at any time during working hours without proper authorization	Reprimand to 5-day suspension	Reprimand to 10-day suspension	Reprimand to removal
Unexcused or unauthorized absence on one or more scheduled days of work or assigned overtime	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Unexcused tardiness	Reprimand	Reprimand to 5-day suspension	Reprimand to removal

*See paragraphs 4 and 5 of this Appendix

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

OFFENSE

RANGE OF REMEDIES

FIRST OFFENSE

SECOND OFFENSE

THIRD OFFENSE

DISCRIMINATION

Discrimination against an employee or applicant based on race, color, religion, sex, disability, national origin, or age, or any reprisal or retaliation action against a complainant, representative, witness, or other person involved in the EEO complaint process

Reprimand to removal

14-day suspension to removal

30-day suspension to removal

Discrimination based on sexual orientation

Reprimand to removal

14-day suspension to removal

30-day suspension to removal

Sexual harassment

Reprimand to removal

14-day suspension to removal

30-day suspension to removal

DRUG ABUSE

*Unlawful use, being under the influence, or possession of drugs or drug paraphernalia on or off duty

14-day suspension to removal

Removal

*Unlawful use, being under the influence, or possession of drugs or drug paraphernalia on a military ship, aircraft, or submarine

30-day suspension to removal

Removal

*Mandatory referral to CEAP is required. For additional guidance see paragraphs 4 and 5 of this Appendix.

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>DRUG ABUSE</u>			
Refusal to obtain counseling and rehabilitation after having been found to use illegal drugs	Reprimand to removal	Removal	
Unlawful distribution, sale, or transfer of drugs or drug paraphernalia on or off duty	Removal		
<u>DRUG TESTING</u>			
Refusal to provide a urine sample when required	14-day suspension to removal	Removal	
Failure to appear for testing when directed, without a deferral	Reprimand to removal	Removal	
Substituting, adulterating or otherwise tampering with a urine sample, testing equipment or related paraphernalia	14-day suspension to removal	Removal	
Attempted or actual falsification, misstatement or concealment of a material fact, record, correspondence or other communication prepared in connection with the collection, handling, transportation or testing of urine samples	Reprimand to removal	14-day suspension to removal	30-day suspension to removal

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

OFFENSE

RANGE OF REMEDIES

FIRST OFFENSE

SECOND OFFENSE

THIRD OFFENSE

MISCELLANEOUS OFFENSES

Betting, gambling, or the promotion thereof on duty or on Department of the Navy premises

Reprimand
to removal

5-day
suspension
to removal

10-day
suspension
to removal

Careless workmanship resulting in delay in production or spoilage or waste of materials

Reprimand
to removal

5-day
suspension
to removal

10-day
suspension
to removal

Criminal, dishonest, infamous or notoriously disgraceful conduct

Reprimand
to removal

14-day
suspension
to removal

30 day
suspension
to removal

Disobedience to constituted authorities; deliberate refusal or failure or delay in carrying out any proper order, work assignment or instruction; insubordination, including failure to follow local or higher level policy

Reprimand
to removal

5-day
suspension
to removal

10-day
suspension
to removal

Discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period

Reprimand
to 14-day
suspension

Excessive Discourteous conduct to the public within any one-year period or any other pattern of discourteous conduct

Reprimand
to 14-day
suspension

7-day
suspension
to 14-day
suspension

14-day
suspension
to removal

Disrespectful conduct, use of insulting, abusive or obscene language to or about other personnel

Reprimand
to removal

5-day
suspension
to removal

10-day
suspension
to removal

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>MISCELLANEOUS OFFENSES</u>			
Falsification (or aiding or assisting in falsification) of time and attendance records or claims against the government	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Falsification, misstatement, or concealment of material fact in connection with any official record	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
False testimony or refusal to testify in an inquiry, investigation or other official proceeding	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Loafing, wasting time, inattention to duty, sleeping on duty	Reprimand to 5-day suspension	5-day suspension to removal	10-day suspension to removal
Making threats to other employees or supervisor; fighting; engaging in dangerous horseplay	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
*Misuse of a Government vehicle	Reprimand to removal	30-day suspension to removal	Removal

* 31 U.S.C. 1349(b) requires a minimum suspension of 30 calendar days even for the first offense, if the misuse was willful, i.e., employee acted either with knowledge that the intended use would be characterized as unofficial or with reckless disregard of whether such use was unofficial.

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

OFFENSE

RANGE OF REMEDIES

FIRST OFFENSE

SECOND OFFENSE

THIRD OFFENSE

MISCELLANEOUS OFFENSES

Reckless driving or improper
operation of motor vehicle:

Causing personal injury to self or others or damage to government property	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
---	-------------------------	------------------------------------	------------------------------------

No personal injury to self or others or damage to government property property	Reprimand to 5-day suspension	Reprimand to 10-day suspension	14-day suspension to removal
---	-------------------------------------	--------------------------------------	------------------------------------

*Unauthorized possession, use, loss, theft or damage to Government property or the property of others	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
--	-------------------------	------------------------------------	------------------------------------

* Under Miguel v. Department of the Army, 727 F.2d 1081, 1083-84 (Fed. Cir. 1984), the Federal Circuit Court held that activities must consider the value of items stolen when determining a penalty for "unauthorized possession" or "theft" of government property. In the absence of aggravating factors, a removal based on de minimis theft will likely result in mitigation of the penalty, even when the activity can show that the employee was on notice that discipline, including removal, could result from theft of government property.

Misuse of government equipment (e.g. unauthorized use of electronic mail, internet, phones, or facsimile equipment)	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
---	-------------------------	------------------------------------	------------------------------------

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>MISCELLANEOUS OFFENSES</u>			
Misuse of Government sponsored travel charge card (e.g. use for unauthorized personal expenses, failure to pay charge card bill in a timely manner, or failure to use card for required expenses arising from official travel)	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Unauthorized use of or failure to appropriately monitor use of Government purchase card	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
<u>PROHIBITED PERSONNEL PRACTICE</u>			
Committing a prohibited personnel practice (See 5 U.S.C. 2302)	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
<u>SAFETY</u>			
Failure to observe posted smoking prohibitions	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Failure to use protective clothing or equipment	Reprimand to removal	5-day suspension to removal	10-day suspension to removal

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>SAFETY</u>			
Violation of safety or traffic regulations on duty or on an installation (on or off duty):			
Causing injury to self or others or damage to property or endangering the safety of self or others	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
No injury or property damage; not endangering the safety of self or others	Reprimand to 5-day suspension	Reprimand to 10-day suspension	Reprimand to removal
<u>SECURITY</u>			
Failure to safeguard classified material:			
Security compromised	Reprimand to removal	14-day suspension to removal	Removal
Security not compromised	Reprimand to 5-day suspension	Reprimand to 14-day suspension	30-day suspension to removal
<u>UNAUTHORIZED DISCLOSURE OR USE OF PROTECTED MATERIAL</u>			
Unauthorized disclosure or use of information or other protected material (e.g., records covered by the Privacy Act or under 42 CFR Part 2 (CEAP records))	Reprimand to removal	14-day suspension to removal	30-day suspension to removal